U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

D7

[redacted]

JAN 27 2005

FILE: SRC 03 210 50022 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president-director as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that is operating as a trading company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Riyadh, Saudi Arabia. The petitioner now seeks to employ the beneficiary for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that the director based her denial of the petition solely on two dollar figures, specifically, the amount paid for salaries and the petitioner's gross annual income. Counsel states this is a "secret additional requirement this adjudicator has tacked onto the law and regulations." Counsel claims that the beneficiary is "performing extensive executive and managerial duties," and asserts that the director's decision is contrary to law. Counsel submits a statement and documentary evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
>
> (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
>
> (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in the instant matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(i) Manages the organization, or a department, subdivision, function, or component of the organization;

(ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on July 23, 2003, stating that as the president-director of the petitioning organization, the beneficiary "[would] continue to manage all operations and will be in charge of hiring, firing, [and] training managers and employees." In an attached letter from the petitioner, dated July 21, 2003, the petitioner provided the following description of the beneficiary's position:

> With the U.S. Corporation, he serves as Director and President and hires, trains, supervises and fires all managerial personnel in our company, who, in turn, perform the same functions with respect to lower echelon employees. He has established and maintains financial relations and is developing and implementing an overall operating structure and marketing plan.

The petitioner submitted Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarter ending on March 31, 2003, which identified the employment of five workers during this period.

In a request for evidence, dated July 29, 2003, the director asked that the petitioner submit a list of the five workers identified on the employer's quarterly tax return and their job titles, and a copy of its quarterly tax return for the quarter ending June 2003.

Counsel responded on August 18, 2003 and stated that the petitioner's five full-time employees include: the beneficiary, a vice-president, an investment manager, a service industries manager, and a worker. Counsel submitted a copy of the petitioner's June 30, 2003 quarterly tax return confirming the employment of five workers.

In a decision dated August 19, 2003, the director determined that the petitioner had not demonstrated the beneficiary's employment in the United States entity in a qualifying capacity. The director, acknowledging the petitioner's five employees, its gross annual income, and the amount paid during the second quarter of 2003 for salaries, stated that the beneficiary's job duties in this position would not be primarily those of a bona fide executive. The director stated that the petitioner did not demonstrate that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, or that the beneficiary would be involved in the supervision and control of supervisory, managerial or professional employees who would relieve the beneficiary from performing the services of the business. The director determined that the petitioning organization had not "expanded to the point where the services of a full-time, bona fide president/director would be required," and stated that the beneficiary would spend the majority of his time performing non-executive daily functions of the business. Consequently, the director denied the petition.

Counsel filed an appeal on September 12, 2003. On appeal, counsel states that the director's denial was based on the application of "secret" standards with respect to the evaluation of the petitioner's 2003 second quarter salaries and its gross income for 2002. Counsel contends that the director "has tacked" an additional requirement onto the law and regulations for an L-1A visa. Counsel further claims that except for these two items, the remainder of the director's decision is a recitation of the statute and regulations, and is a conclusory denial of the petition. Counsel states "[t]he beneficiary is obviously performing extensive executive and managerial duties in researching and evaluating these plans and actually consummating business deals." Counsel claims it is irrelevant that the beneficiary employed five workers at the time of filing the petition, and states that the beneficiary "is simply a good, efficient, cost-conscious manager who can get a lot done with a few good men and women." Counsel submits additional documentation, including the petitioner's business plan, in support of the appeal.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

Here, the petitioner submitted a brief paragraph of the beneficiary's job duties, which fails to provide an accurate description of the managerial or executive job duties the beneficiary would perform. It is insufficient to merely repeat the statutory and regulatory requirements for managerial and executive capacity by stating that the beneficiary "hires, trains, supervises and fires all of the managerial personnel," "maintains financial plans," and implements the company's operating structure and marketing plans. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, while the petitioner identifies the employment of four additional workers, the majority of who possess managerial titles, the record lacks evidence as to the job duties performed by each. This information is essential to determining whether each is actually employed in a claimed managerial position and whether the beneficiary is relieved from performing non-qualifying functions of the business. The petitioner's claim in its July 21, 2003 letter that the managerial personnel hire, train, supervise and fire the "lower echelon

employees" is also unsupported by the record, as the petitioner has not identified any lower-level employees, other than a "worker." The AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, despite counsel's suggestion on appeal that the number of workers employed by the petitioner is not relevant, Citizenship and Immigration Services (CIS) may consider a company's personnel size when determining managerial or executive capacity if the reasonable needs of the corporation are also considered. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). It is also appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The instant record is insufficient to determine whether the reasonable needs of the organization are meet.

Counsel also claimed on appeal that the director's request for additional evidence contained four "simple questions," all of which were answered completely. It appears that counsel is relying solely on the petitioner's response to the director's questions as a basis for approval of the petition. Counsel fails to recognize that, as noted above, the petitioner has an affirmative duty at the time of filing the petition to demonstrate through "a detailed description of the services to be performed [by the beneficiary]" that the beneficiary would be employed in the United States in a managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(ii). Additionally, the regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence "in . . . instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

With regard to the new evidence submitted by counsel on appeal, it is unclear how the documentation supports the petitioner's claim that the beneficiary would be employed by the United States entity in a qualifying capacity. Specifically, counsel submits photographs, flyers and product specifications for a cellular telephone business, correspondence and product lists for Pride Mobility, a manufacturer of mobility products, and a letter of intent for the lease of additional warehouse space. It appears that the petitioner plans to expand into other areas of business, yet neither counsel nor the petitioner has identified whether the petitioner presently owns and operates a cellular phone business or sells "Pride Mobility" products. More importantly, if the petitioner operates these businesses, there is no explanation how the beneficiary would be employed as a manager or an executive with respect to the businesses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.